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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 346

LOUISIANA DELTA CATTLE CO., INC.,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF FOR PETITIONER.

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OGDEN & WOODS.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully petitions that a writ of certiorari issue to review the judgment entered May 5, 1941, in the Court of Claims of the United States in the above entitled cause.

The Judgment Below.

The judgment of the Court of Claims of the United States was entered May 5, 1941 (R. 11) in cause No. 43575, Louisiana Delta Cattle Co., Inc. *v.* The United States (92 Ct. Cls. —) sustaining a motion to dismiss, and thereby dismissing the petition below for recovery of $159,002.25 as the value

of property allegedly taken for public use by the erection of a certain levee to straighten the Mississippi River channel, by a cut-off of petitioner acreage from natural and existing protection against waters, for purposes of Flood Control.

Certified copies of the record, inclusive of the petition, motion to dismiss, opinion and judgment below, accompany this petition.

Questions Presented.

(a) Whether the petition below states a sufficient cause of action when construed in reference to decisions of this Court, and particularly its recent decisions in *United States* v. *Sponenbarger*, 308 U. S. 256, and *Danforth* v. *United States*, 308 U. S. 271.

(b) Whether the dismissal of the petition is in conflict with said decisions and other precedents.

The Constitution and Statute Involved.

The Vth Amendment provides: "nor shall private property be taken for public use without just compensation." The Flood Control Act of 1928 declares the sense of Congress that no further private contribution beyond rights of way for levees shall be required. These sections are set forth in the Congressional Committee report in the Appendix to the Supporting Brief.

Statement of the Case.

The court below, in its opinion upon the motion to dismiss (R. 7-11) succinctly summarizes the facts of the case presented in the petition, and dismiss the petition (R. 11), on the ground "everything alleged is prospective." In the opinion summary the following material facts are stated; (petitioner italics):

> "Plaintiff is a corporation, and in its petition alleges that it is the owner of certain tracts of land, described

at length therein, embracing 4,663.52 acres located adjacent or near the Mississippi River, and that at the time of the acquisition of this real property the same was *defended and protected against flood or water submergence by public levees* along the banks of the Mississippi River upon said property whereby the *property was arable and of value and subject to drainage of rainfall;* that, notwithstanding said conditions so existing, the defendant by its authorized agencies, on or about July 13, 1931, and thereafter, and acting within the scope and under authority of the Flood Control Act did select and locate a set-back or new levee line as part of a certain procedure adopted by defendant and known as the Jadwin Plan of Flood Control of the Mississippi River; * * * , whereby the new levee was tied into the previously existing levees in or about the months of July or October 1934, and *drainage outlets previously existing were stopped and made ineffective;* that by the West Point New Levee defendant has materially lessened and shortened the west bank levee line on the Mississippi River and has thereby *taken from plaintiff and placed on the river side all lands and improvements of plaintiff* lying east of the West Point New Levee, within the intendment and meaning of the Fifth Amendment to the Constitution and the Flood Control Act.

"Plaintiff states, by the West Point New Levee constructed and tied to existing levees at both ends, defendant has segregated and excluded all land and improvements of plaintiff from levee protection and from drainage, whereby the land and improvements, through lack of drainage, will be inundated by the natural rainfall, which averages sixty inches annually, and converted into a bog or marsh unfit for cultivation or other use, and whereby, in event of abandonment or removal of the previous levees around the property, which abandonment or removal plaintiff alleges and charges defendant purposes to accomplish and obtain, the river waters will be induced to break through upon the lands of plaintiff in the establishment of a new channel thereon, thereby putting the lands permanently

in the bed of the river, or establishing constant flowage rights thereon, and by the acts of the defendant, the lands of plaintiff will be made unfit and entirely destroyed.

"The plaintiff further states that by the adoption of the Jadwin Plan of Flood Control and the enactment of the Flood Control Act, as amended, the defendant has assumed full responsibility for the control of the flood waters of the Mississippi River and its tributaries; that by its acts aforesaid, the defendant *has deprived and does deprive the plaintiff of levee protection* on the west bank of the Mississippi River, and of drainage as previously existing and enjoyed by the plaintiff, and *has exposed the lands and improvements* of the plaintiff *to overflow of the waters* and *has caused the lands and improvements* of the plaintiff *to be and remain unprotected in the making of the new channel,* and thereby *to be made entirely without further value to plaintiff,* and *to be taken for public use, damaged and destroyed, without making compensation therefor to plaintiff.*

"Plaintiff further states that before the construction of the West Point New Levee, and on and after July 13, 1931, the land and property of plaintiff, with improvements, were *worth not less than $159,002.25;* but that since its construction is *without saleable value* and the *use thereof for all practical purposes has been taken and destroyed, to the consequent loss or damage of plaintiff in the full value thereof,* as above stated."

Ruling Below.

The ruling below is that the petition below does not state a cause of action (R. 11) and should be dismissed.

Specifications of Error.

The court below erred:

1. In holding said petition does not state a good and sufficient cause of action when tested by the motion to dismiss.

2. In holding the said petition is insufficient when tested by the *Sponenbarger, Danforth* and related decisions.

Reasons for Granting the Writ.

1. The validity of the Flood Control Act being unquestioned, petitioner is confined to the legal right of recovery, under the Tucker Act, of the same compensation awardable in a condemnation proceeding.[1] The right, reflecting the constitutional guarantee—"nor shall private property be taken for public use without just compensation"—requires close inquiry into every case. Herein acts done in and before 1934 are the basis of the petition in 1937, and are admitted by the motion to dismiss. The conclusion below "that everything alleged is prospective" conflicts with the ruling of this Court as to the sufficiency upon demurrer of a very similar petition,[2] as follows:

> "As we have said, the intent and overt acts are alleged, as is also the conclusion that the United States has taken the land. That we take to be stated as a conclusion of fact, and not of law, and as intended to allege the actual import of the foregoing acts. In our opinion the specific acts set forth would warrant a finding that a servitude has been imposed."

Between the truth of the facts alleged and admitted by the motion, and the denial of their truth, by sustaining the motion to dismiss, there is conflict so evident petitioner feels obliged to restate its grievance for consideration by this Court. The lawful right to be heard on the merits believed improperly denied below, is the primary issue sought to be upheld herein.

2. Principles of decision recently laid down by this Court in its *Sponenbarger* and *Danforth* opinions involving flood-

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[1] *Hurley* v. *Kincaid,* 285 U. S. 95, 104.

[2] *Portsmouth Harbor L. & H. Co.* v. *United States,* 260 U. S. 327, 330.

way diversion situations are submitted not to be entirely applicable to situations involving channel stabilization. The temporary servitude imposed in a floodway is less than the permanent servitude imposed in the conversion of private property into bog and ultimately into river-bed. Further statement of the principles of decision applicable to such different situations appears desirable.

3. The desirability of such statement is suggested by the later decision [3] of this Court that the need or wisdom and incidents of Flood Control projects are matters for the Congress and not for the courts, where the Government is to acquire the inundated land and there is no complaint about just compensation being received by the private owner. In reference to the present case, it will appear Congress has twice sought to provide compensation to petitioner, and that the right to claim same stands defeated by administrative, executive and judicial attitudes unless restored as the result of this petition.

In the supporting brief, the further viewpoint of petitioner on the questions and matters involved herein is respectfully presented.

WHEREFORE, it is respectfully submitted that this petition should be granted.

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[3] *Oklahoma* v. *Guy F. Atkinson Co.*, (opinion June 2, 1941) — U. S. —.